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 Does*

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

COURTNEY MCMILLIAN and RONALD
 COOPER,

Plaintiffs,

v.

X CORP., f/k/a/ TWITTER, INC.,
 X HOLDINGS, ELON MUSK, Does,

Defendants.

Case No. 3:23-cv-03461-TLT

**DEFENDANTS' RESPONSE TO
 NOTICE OF QUESTIONS**

Re: Dkt. Nos. 24, 38, 47

Judge: Trina L. Thompson

Pursuant to the Court's Notice of Questions (Dkt. 65) regarding Plaintiffs' Motion for Notice of Suit (Dkt. 24), Defendants' Motion to Dismiss Plaintiffs' Amended Complaint (Dkt. 38), and Plaintiffs' Request for Judicial Notice (Dkt. 47), Defendants X Corp., X Holdings Corp., and

1 Elon Musk (together “Defendants”), provide the following responses:

2
3 **Question No. 1.** What is the effective date, or are the effective dates, of the “formalized
4 policy [memorialized] in the several documents that provide a uniform and detailed policy
5 framework for the numerous post-termination benefits Twitter provided to employees” (“the
6 alleged ERISA plan” or “the Plan”)? How many companies have the same alleged ERISA plan for
7 their workers/former workers? Please attach to a Declaration or Stipulation all documents that
8 make up the alleged ERISA plan.

9 **Defendants’ Response to Question No. 1.** As explained in Defendants’ Motion to
10 Dismiss, Twitter and/or X Corp. did not maintain an ERISA-governed severance plan as alleged in
11 the Amended Complaint. Plaintiffs have identified no governing plan documents or “formalized
12 polic[ies]” that provide an ongoing administrative scheme for Twitter severance payments, let alone
13 the “effective dates” for such documents. Instead, Plaintiffs mischaracterize the so-called
14 “Severance Matrix” as an ERISA plan document, when that document is not a plan document at all
15 but privileged work-product containing certain Twitter compensation information prepared by the
16 Company’s in-house counsel in anticipation of litigation and in connection with certain
17 employment decisions related to the merger. Plaintiffs improperly filed the “Severance Matrix” on
18 the Court’s docket before seeking to have it provisionally sealed, and the document remains sealed
19 today. Plaintiffs also appear to suggest that a communication sent by Twitter to its employees in
20 2022, titled “Acquisition FAQs,” constitutes a plan document. But the Supreme Court and the
21 Ninth Circuit have made clear that this sort of summary communication does not “constitute the
22 terms of the plan” under ERISA. *See CIGNA Corp. v. Amara*, 563 U.S. 421, 438 (2011); *Skinner*
23 *v. Northrop Grumman Ret. Plan B*, 673 F.3d 1162, 1165 (9th Cir. 2012); *Oldoerp v. Wells Fargo*
24 *& Co. Long Term Disability Plan*, 500 F. App’x 575, 577 (9th Cir. 2012). Nor does the Merger
25 Agreement identified in Plaintiffs’ Opposition to Defendants’ Motion to Dismiss constitute an
26 ERISA plan under any reading of the Agreement or the law. *See* Dkt. 50, Defs.’ Reply, at 6-10. In
27 short, Plaintiffs do not (and cannot) point to a single shred of evidence that Twitter and/or X Corp.
28 maintained an ERISA-governed severance plan as alleged in the Amended Complaint. Indeed, the

1 more than 2,000 other employees that are currently suing Defendants in court or arbitration in
 2 connection with its reductions in force following the merger recognize this. None of those
 3 employees claims the existence of an ERISA plan, and instead they are proceeding on state law
 4 breach-of-contract and promissory-estoppel theories. Moreover, if Twitter and/or X Corp. did
 5 maintain an ERISA-governed severance plan as alleged, Defendants would have every incentive to
 6 say so, because if a court were to so conclude, it would be a basis for Defendants to dismiss all
 7 those 2,000+ contract-related claims on the ground that they are preempted by ERISA. *See* 29
 8 U.S.C. § 1144(a); *Spain v. Aetna Life Ins. Co.*, 11 F.3d 129, 131 (9th Cir. 1993) (noting ERISA’s
 9 preemption clause is “deliberately expansive”). The Court should thus recognize this lawsuit for
 10 what it is: an opportunistic effort by a plaintiffs’ law firm to belatedly piggyback on the reduction-
 11 in-force-related litigation brought by other plaintiffs’ firms in the hope of extracting a nuisance-
 12 value settlement. As to the Court’s second sub-question, because no “Plan” exists, there are
 13 necessarily no other companies who have offered the same alleged ERISA plan for their employees.

14
 15 **Question No. 2.** Is the document filed as ECF No. 1-1, at 2 (“Severance Matrix”) a part of
 16 the “several documents” referenced in Question No. 1?

17 **Defendants’ Response to Question No. 2.** Defendants incorporate their response to
 18 Question No. 1. As explained above, the “Severance Matrix” is not an ERISA plan document, but
 19 privileged work-product that contains certain compensation information. And even if the
 20 “Severance Matrix” were a “formalized policy” constituting an ERISA plan (it is not), the
 21 document was obtained through inappropriate means and is not properly before the Court, and thus
 22 should not be considered in connection with Plaintiffs’ Amended Complaint or the Notice of
 23 Questions.

24
 25 **Question No. 3.** What are the first and last names (and titles at the time of signing) of the
 26 individuals who signed the documents constituting the alleged ERISA plan? Which of those
 27 individuals are alleged to be fiduciaries? Is Plaintiff aware of the identities of any of the DOE
 28 Defendants, if not already listed? If so, what are their first and last names and current titles.

Defendants’ Response to Question No. 3. Defendants incorporate their responses to Question Nos. 1 and 2. As explained above, Twitter and/or X Corp. did not maintain an ERISA-governed severance plan as alleged, and therefore there are no plan documents or “formalized polic[ies]” that contain the signatures of any individuals currently or formerly employed by Twitter or X Corp. Similarly, because there are no fiduciaries in relation to the alleged severance plan, there are no plan documents identifying any named fiduciaries, and no individuals acting as functional or de facto fiduciaries to a plan. Further, as explained in Defendants’ Motion to Dismiss, Plaintiffs fail to adequately allege that Defendant Musk (or anyone else) acted as a functional fiduciary in relation to the any plan. “To determine whether one qualifies as a fiduciary, courts ask whether one exercises discretionary authority or control respecting management over the plan . . . or has discretionary authority or responsibility in the administration of the plan.” *Brown v. Cal. Law Enforcement Ass’n, Long-Term Disability Plan*, 81 F.Supp.3d 930, 934 (N.D. Cal. 2015) (citing 29 U.S.C. § 1002(21)(A)). Plaintiffs have failed to allege that Defendant Musk (or anyone else at Twitter or X Corp.) exercised any discretionary authority over Twitter’s severance payments in order to survive dismissal of those claims, and Defendants maintain that Plaintiffs would fail to make such a showing even if this case proceeded to discovery.

Question No. 4. For the period before October 27, 2022, assuming the Plan had been governed by ERISA during that period, please list all the locations where the alleged ERISA plan was administered. If there have been multiple locations where the alleged ERISA plan was administered, please provide a timeline showing the dates and locations so that the Court knows when the location of the alleged ERISA plan’s place of administration was changed.

Defendants’ Response to Question No. 4. Defendants incorporate their responses to Question Nos. 1-3. As explained above, Twitter and/or X Corp. did not maintain an ERISA-governed severance plan as alleged, and therefore there was no “location” (or “locations”) where the alleged plan was or could have been administered.

Question No. 5. For the period before October 27, 2022, if or when applicable, how often

1 did the employer(s) submit contributions to the alleged ERISA plan?

2 **Defendants' Response to Question No. 5.** Defendants incorporate their responses to
3 Question Nos. 1-4. As explained above, Twitter and/or X Corp. did not maintain an ERISA-
4 governed severance plan as alleged, and therefore Twitter and/or X Corp. did not submit any
5 employer contributions to the alleged plan.

6
7 **Question No. 6.** For the period on and after October 27, 2022, assuming the alleged ERISA
8 plan has been governed by ERISA, please list all the locations (*i.e.* city and state) where the alleged
9 ERISA plan has been administered. If there have been multiple locations where the plan has been
10 administered, please provide a timeline showing the dates and locations so that the Court knows
11 when the location(s) of the alleged ERISA plan's place(s) of administration was changed, and the
12 current location(s) of the alleged ERISA plan's place(s) of administration.

13 **Defendants' Response to Question No. 6.** Defendants incorporate their responses to
14 Question Nos. 1-5. As explained above, Twitter and/or X Corp. did not maintain an ERISA-
15 governed severance plan as alleged, and therefore there was no "location" (or "locations") where
16 the alleged plan was or could have been administered.

17
18 **Question No. 7.** For the period on and after October 27, 2022, how often did the
19 employer(s) submit contributions to the alleged ERISA plan, if at all?

20 **Defendants' Response to Question No. 7.** Defendants incorporate their responses to
21 Question Nos. 1-6. As explained above, Twitter and/or X Corp. did not maintain an ERISA-
22 governed severance plan as alleged, and therefore Twitter and/or X Corp. did not submit any
23 employer contributions to the alleged plan.

24
25 **Question No. 8.** Besides the cases listed in Defendants' Memorandum in Opposition to
26 Plaintiffs' Motion for Notice of Action, please list all cases—whether filed in state court or federal
27 court—that were filed against any of the Defendants relating to the failure to pay wages or provide
28 employee benefits during the same or overlapping period that Plaintiff is alleging Defendants

denied her and the putative class benefits under the alleged ERISA plan.

Defendants’ Response to Question No. 8. In addition to the *Cornet*, *Borodaenko*, and *Striffling* cases identified in Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Notice of Action, Defendants identify the following cases that relate to the alleged failure by Twitter and/or X Corp. to pay wages or provide employee benefits during the same period Plaintiffs allege in the Amended Complaint:

1. *Justice, et al. v. Twitter, Inc.*, CGC-23-604287 (Cal. Sup. Ct. Jan. 26, 2023).
2. *Adler v. Twitter, Inc.*, Case No. 3:23-cv-01788 (N.D. Cal. April 13, 2023).
3. *Zeman v. Twitter, Inc.*, Case No. 3:23-cv-01786 (N.D. Cal. April 13, 2023).
4. *Arnold v. X Corp.*, Case No. 1:23-cv-00528 (D. Del. May 23, 2023).
5. *Borghino v. Twitter, Inc.*, CGC-23-606992 (Cal. Sup. Ct. June 12, 2023).
6. *Schobinger v. Twitter, Inc.*, Case No. 3:23-cv-03007 (N.D. Cal. June 20, 2023).
7. *Woodfield v. X Corp.*, Case No. 1:23-cv-00780 (D. Del. July 18, 2023).
8. *Weinberg v. Twitter, Inc.*, Case No. 3:23-cv-04016 (N.D. Cal. Aug. 8, 2023).
9. *Rosa v. X Corp.*, Case No. 2:23-cv-22908 (D.N.J. Dec. 5, 2023).
10. *Frederick-Osborn v. Twitter, Inc.*, Case No. 3:24-cv-00125 (N.D. Cal. Jan. 5, 2024).

Of these cases, the *Cornet*, *Justice*, and *Woodfield* cases in particular assert claims that putative class members were denied severance to which they allege they were contractually or otherwise entitled and are pending in the United States District Court for the District of Delaware (*Cornet* and *Woodfield*) and the Superior Court for the County of San Francisco (*Justice*). These actions seek materially identical relief to that requested by Plaintiffs here, under varying legal theories.

While Defendants maintain the Court should dismiss Plaintiffs’ claims with prejudice for the reasons set forth in their Motion to Dismiss (including because Plaintiffs fail to allege an ERISA-governed Twitter severance plan existed), the Court may also decide within its discretion to stay this case pending the resolution of these other putative class actions that seek severance benefits allegedly owed to former Twitter and X Corp. employees. A court may stay proceedings as part of its inherent power “to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254

(1936); *see also* *Clinton v. Jones*, 520 U.S. 681, 706 (1997) (“The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.”). The inherent power to stay includes ordering a stay “pending resolution of independent proceedings which bear upon the case.” *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). “Where a stay is considered pending the resolution of another action, the court need not find that two cases possess identical issues; a finding that the issues are substantially similar is sufficient to support a stay.” *Murillo v. Target Corp.*, 2023 WL 4553597, at *5 (C.D. Cal. July 14, 2023); *see also* *Murillo v. Target Corp.*, 2023 WL 4553597, at *12 (C.D. Cal. July 14, 2023) (“it is hardly surprising or unfair that [one] case will have to wait in line for an earlier-filed class action brought by a substantially similar putative class asserting substantially similar claims.”).

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